

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

WILLIAM LEONARD,

Plaintiff,

Case No. 3:15-cv-00275-MMD-VPC

v.

RENEE BAKER, et. al.,

Defendants.

**ORDER REGARDING REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE
VALERIE P. COOKE**

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge Valerie P. Cooke (ECF No. 89) (“R&R” or “Recommendation”) relating to Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (ECF Nos. 53, 54). Plaintiff filed his objection (ECF No. 90) to which Defendants responded (ECF No. 92). Plaintiff then filed his reply without seeking leave of court (ECF No. 95). LR IB 3-2(a) provides that a reply in response to an objection to the Magistrate Judge’s report and recommendation may be filed only with leave of the court. Plaintiff did not seek leave to file a reply and given the extensive briefings relating to Defendants’ Motion, the Court finds that Plaintiff’s reply is unwarranted and will grant Defendants’ motion to strike Plaintiff’s reply (ECF No. 98). Because the Court did not grant Plaintiff leave to submit purported new evidence in opposition to Defendants’ Motion, the Court grants Defendant’s motions to strike Plaintiff’s purported new evidence submission and notice of new evidence (ECF Nos. 91, 94, 107). (ECF Nos. 97, 111.)

Plaintiff filed several motions that are related to the Court's resolution of the R&R: second motion for appointment of counsel (ECF No. 88); second motion for reconsideration (ECF No. 93), motion for continuance (ECF No. 99), and motions for

1 leave to file new evidence (ECF Nos. 103, 114). The Court will address these motions
2 first.

3 **II. BACKGROUND**

4 Plaintiff William Leonard is an inmate in the custody of the Nevada Department of
5 Corrections (“NDOC”) and currently housed at Ely State Prison (“ESP”). On May 31,
6 2016, this Court issued a screening order on Plaintiff’s first amended complaint (“FAC”)
7 and permitted Counts I, II and IV to proceed. (ECF No. 13 at 10-11; see ECF No. 11.)
8 The Court dismissed Counts III and V without prejudice. (ECF No. 13 at 10.) The Court
9 also dismissed Defendants Baker, Cox, Aranas, Koehn, Jones, Drain, Smith, Fletcher
10 and Byrne without prejudice. (*Id.* at 11.) The Court subsequently granted Plaintiff’s
11 motion for leave to file his second amended complaint (“SAC”), which is nearly identical
12 to the FAC, and permitted the same three counts to proceed. (ECF No. 48.) Plaintiff then
13 filed a 96-page motion for reconsideration of this Court’s May 2016 screening order.
14 (ECF No. 50.) The Court denied his motion, finding that “Plaintiff has not provided the
15 Court with any newly discovered evidence that would change the outcome of the
16 screening order.” (ECF No. 81 at 2.)

17 Plaintiff’s claims arise from two separate incidents. The first two counts are based
18 on Plaintiff’s allegations that he had been suffering from a sore and bleeding penis and
19 that he was not offered a “dry cell” in which to provide his urine sample, but was instead
20 catheterized when he was unable to provide a urine sample. (ECF No. 49 at 7-9.) The
21 third count is based on Defendants Dr. Shaw and Seena’s alleged deliberate
22 indifference to Plaintiff’s broken denture and his need for “soft diet” as a result. (*Id.* at 12-
23 13, 21.) The relevant background facts are set forth in detailed in the R&R, which this
24 Court adopts. (ECF No 89 at 4-5, 9.)

25 **III. PLAINTIFF’S MOTIONS**

26 Plaintiff’s pending motions are essentially motions for reconsideration since the
27 Court has addressed the issues raised in these motions. A motion to reconsider must set
28 forth “some valid reason why the court should reconsider its prior decision” and set “forth

1 facts or law of a strongly convincing nature to persuade the court to reverse its prior
2 decision." *Frasure v. United States*, 256 F.Supp.2d 1180, 1183 (D. Nev. 2003). Mere
3 disagreement with an order is an insufficient basis for reconsideration. The Court finds
4 Plaintiff has not presented a valid reason for the Court to reconsider.

5 The Court denied Plaintiff's motion for appointment of counsel, finding that this
6 case does not meet the exceptional circumstances requirement for the Court to seek
7 volunteer counsel to represent Plaintiff. (ECF No. 35.) Plaintiff's second motion for
8 appointment of counsel (ECF No. 88) is therefore denied. The Court previously denied
9 Plaintiff's motion for reconsideration (ECF No. 81) and will not reconsider its earlier
10 ruling. Plaintiff's second motion for reconsideration (ECF No. 93) is therefore denied.
11 The Court previously denied Plaintiff's motion for continuance of the summary judgment
12 proceedings to permit him to conduct discovery. (ECF No. 97 at 2.) Plaintiff offers no
13 valid reason for the Court to reconsider and therefore his second motion for continuance
14 (ECF No. 99) is denied.

15 Plaintiff filed two motions for leave to file new evidence and arguments in support
16 of his opposition to Defendants' Motion. (ECF No. 103, 114.) In the first motion, he
17 essentially offers evidence presented through his expert witnesses' declarations that
18 catheterization was not medically necessary. He also reargues his objection that "there
19 was no medical order to catheterize Plaintiff because he had a problem with his bladder
20 and was unable to urinate."¹ (ECF No. 103 at 10.) In the second motion, Plaintiff
21 challenges the order for him to be catheterized and appears to ask for leave to amend to
22 sue the doctor who issued the order. (ECF No. 114 at 4.) The Court finds that Plaintiff
23 has had ample opportunity to present evidence in opposition to Defendants' Motion and
24 in support of his objection. Moreover, Plaintiff's two motions repeat arguments presented
25 in his opposition to Defendants' Motion and his objection. Accordingly, the Court denies
26 Plaintiff's two motions for leave to file new evidence and arguments. Plaintiff cannot

27 ¹This is the main argument Plaintiff raised in his objection to the Magistrate
28 Judge's recommendation to grant summary judgment on Counts I and II. (ECF No. 90 at
2-5.)

1 continue to repeated motions offering essentially the same arguments because he
2 disagrees with the Court's rulings.

3 **IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

4 **A. Legal Standards**

5 This Court "may accept, reject, or modify, in whole or in part, the findings or
6 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
7 timely objects to a magistrate judge's report and recommendation, then the court is
8 required to "make a *de novo* determination of those portions of the [report and
9 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). Where a party fails
10 to object, however, the court is not required to conduct "any review at all . . . of any issue
11 that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985).
12 Indeed, the Ninth Circuit has recognized that a district court is not required to review a
13 magistrate judge's report and recommendation where no objections have been filed. See
14 *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard
15 of review employed by the district court when reviewing a report and recommendation to
16 which no objections were made); see also *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219,
17 1226 (D. Ariz. 2003) (reading the Ninth Circuit's decision in *Reyna-Tapia* as adopting the
18 view that district courts are not required to review "any issue that is not the subject of an
19 objection."). Thus, if there is no objection to a magistrate judge's recommendation, then
20 the court may accept the recommendation without review. See, e.g., *Johnstone*, 263 F.
21 Supp. 2d at 1226 (accepting, without review, a magistrate judge's recommendation to
22 which no objection was filed).

23 "The purpose of summary judgment is to avoid unnecessary trials when there is
24 no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*,
25 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the
26 pleadings, the discovery and disclosure materials on file, and any affidavits "show there
27 is no genuine issue as to any material fact and that the movant is entitled to judgment as
28 a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is

1 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could
2 find for the nonmoving party and a dispute is “material” if it could affect the outcome of
3 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
4 (1986). Where reasonable minds could differ on the material facts at issue, however,
5 summary judgment is not appropriate. See *id.* at 250-51. “The amount of evidence
6 necessary to raise a genuine issue of material fact is enough ‘to require a jury or judge to
7 resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718
8 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S.
9 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts
10 and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*
11 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

12 The moving party bears the burden of showing that there are no genuine issues
13 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
14 the moving party satisfies Rule 56’s requirements, the burden shifts to the party resisting
15 the motion to “set forth specific facts showing that there is a genuine issue for trial.”
16 *Anderson*, 477 U.S. at 256. The nonmoving party “may not rely on denials in the
17 pleadings but must produce specific evidence, through affidavits or admissible discovery
18 material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,
19 1409 (9th Cir. 1991), and “must do more than simply show that there is some
20 metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th
21 Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
22 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s position
23 will be insufficient.” *Anderson*, 477 U.S. at 252.

24 **B. Discussion**

25 The Magistrate Judge recommends granting summary judgment on all three
26 counts that survived screening. The Court will address each count below.

27 ///

28 ///

1 **1. Count I: Unreasonable Search in Violation of the Fourth**
2 **Amendment**

3 In *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602 (1989), the Supreme Court
4 held that the collection and testing of urine is a search and seizure within the meaning of
5 the Fourth Amendment. *Id.* at 617. “[T]o avoid the proscription of the Fourth Amendment,
6 urinalyses must be conducted in a reasonable manner.” *Thompson v. Souza*, 111 F.3d
7 694, 701 (9th Cir. 1997). To determine reasonableness, the Supreme Court has held
8 that each case “requires a balancing of the need for the particular search against the
9 invasion of personal rights that the search entails” and that “[c]ourts must consider the
10 scope of the particular intrusion, the manner in which it is conducted, the justification for
11 initiating it, and the place in which it is conducted.” *Bell v. Wolfish*, 441 U.S. 520, 559
12 (1979); see also *Souza*, 111 F.3d at 702 (applying the *Bell* balancing factors in light of
13 the test articulated in *Turner v. Safley*, 482 U.S. 78 (1987)). However, prison officials are
14 “accorded wide-ranging deference in the adoption and execution of policies and
15 practices that in their judgment are needed to preserve internal order and discipline and
16 to maintain institutional security.” *Id.* at 547.

17 The Magistrate Judge recommends granting summary judgment on Count I,
18 finding that the collection of urine under the circumstances of this case to be reasonable
19 after examining the above referenced factors. In particular, the Magistrate Judge found
20 that the parties do not dispute that (1) the scope of the search was reasonable because
21 Plaintiff was randomly selected for urinalysis, (2) random urinalysis was justified and (3)
22 the place of the urinalysis was reasonable because it occurred in an ESP medical
23 examination room. (ECF No. 89 at 6.) The Magistrate Judge found that Plaintiff's
24 urinalysis was reasonably related to legitimate penological interests. (*Id.*) Plaintiff does
25 not object to these findings. The Court thus adopts the Magistrate Judge's findings on
26 these issues. *Thomas*, 474 U.S. at 149.

27 Plaintiff's main objection with respect to Count I is the Magistrate Judge's finding
28 that the manner in which the urinalysis was conducted was reasonable the

1 catheterization was not done for the purpose of collection. In particular, the medical
2 records show that “the catheterization was performed because of Plaintiff’s complaints
3 about pain and blood in his urine” and the urinalysis was collected after the
4 catheterization. (ECF No. 89 at 6.) The Magistrate Judge cites to the following evidence
5 in the records as support for her finding:

6 An examination of plaintiff’s medical records indicates that the
7 catheterization was done for this purpose. (See ECF Nos. 54-1, 54-2 at 2.)
8 A “medical report of incident, injury or unusual occurrence” was filled out
9 on July 9, 2014 stating that “inmate reported urine [with] blood in it.” (ECF
10 No. 54-1.) The medical report further states that a “straight cath” and “urine
11 dip” were performed and that the specimen was sent to CERT, presumably
12 for the urinalysis. (*Id.*) Plaintiff’s progress notes further indicate that the
13 catheterization was done because of plaintiff’s complaints of “pain in
14 urethra and bladder area” and plaintiff stated he felt more “relieved” after
15 the catheterization. (ECF No. 54-2 at 2.)

16 (*Id.*)

17 Plaintiff challenges this finding in his objection, contending that “the medical
18 records do not show the catheterization was done to obtain a urine specimen regarding
19 blood in Plaintiff’s urine.” (ECF No. 90 at 2.) Plaintiff’s contention is not supported by the
20 records. Defendants submitted a document entitled “Medical Report of Incident, Injury or
21 Unusual Occurrence” for Plaintiff dated July 9, 2014, which states: “inmate reported
22 ‘urine blood in it’ – MD ordered straight cath + urine dip done.” (ECF No. 54-1 at 2.) The
23 “Progress Notes” for Plaintiff contain a notation for July 9, 2014, stating essentially that
Plaintiff was “catherized” and that he had “c/o pain in urethra + bladder area – stable he
now feels more ‘relieved.’” (ECF No. 54-2 at 2.) The Court thus agrees with the
Magistrate Judge’s finding that the manner of the collection of Plaintiff’s urine sample
after he was catheterized was not unreasonable.

24 **2. Count II: Deliberate Indifference to Serious Medical Need Re
25 Treatment for Pain and Blood in Urine**

26 Deliberate indifference to a prisoner’s serious medical needs violates the Eighth
27 Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). “To establish an Eighth
28 Amendment violation, a plaintiff must satisfy both an objective standard — that the

1 deprivation was serious enough to constitute cruel and unusual punishment — and a
2 subjective standard — deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985
3 (9th Cir. 2012). The first prong requires plaintiff to “a serious medical need by
4 demonstrating that failure to treat a prisoner’s condition could result in further significant
5 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
6 1096 (9th Cir. 2006) (internal quotations omitted). The second prong requires plaintiff to
7 show “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical
8 need and (b) harm caused by the indifference.” *Id.* “Indifference may appear when prison
9 officials deny, delay or intentionally interfere with medical treatment, or it may be shown
10 by the way in which prison physicians provide medical care.” *Id.* (internal quotations
11 omitted). Mere negligence does not rise to an Eighth Amendment violation. *Hutchinson*
12 *v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

13 Moreover, prison officials are not deliberately indifferent simply because they
14 selected or prescribed a course of treatment different than the one the inmate requests
15 or prefers. *Toguchi v. Chung*, 391 F.3d 1050, 1058 (9th Cir. 2004). Only where the
16 prison official’s “chosen course of treatment was medically unacceptable under the
17 circumstances,’ and was chosen ‘in conscious disregard of an excessive risk to the
18 prisoner’s health,” will the treatment decision be found constitutionally infirm. *Id.* (quoting
19 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)). In addition, it is only where those
20 infirm treatment decisions result in harm to the plaintiff—though the harm need not be
21 substantial—that Eighth Amendment liability arises. *Jett*, 439 F.3d at 1096.

22 The Magistrate Judge found that Plaintiff can satisfy the first prong—that his
23 reports of blood in his urine and an inability to produce urine shows a serious medical
24 need. (ECF No. 89 at 8.) However, the Magistrate Judge found that the second prong is
25 not satisfied because the medical records show that “the purpose of the catheterization
26 was to address plaintiff’s complaints of pain and blood in his urine, and inability to
27 produce urine.” (*Id.*) It is this finding that Plaintiff disputes. He argues that given his
28 report of pain and soreness, “having a catheter shoved into [his] sore penis amounts to

1 deliberate indifference." (ECF No. 90 at 4.) He insists that "catheterization is not how to
2 determine blood in urine" or "how you treat someone who complained of penis pain and
3 blood in urine."² (*Id.* at 4-5.) Plaintiff contends that Defendants' use of the catheter under
4 the circumstances here was done in conscious disregard of excessive risk to his health.

5 The Court agrees with the Magistrate Judge's finding that the medical records
6 undisputedly show that the catheterization was ordered to address Plaintiff's complaint of
7 pain and blood in his urine. (See discussion *supra* at Sect. III(B)(2).) Plaintiff's contention
8 that catheterization was not medically necessary because he had complained of pain
9 and catheterizing only enhanced his pain, not resolved it, is not supported by the
10 undisputed medical records. Moreover, even accepting Plaintiff's contention as true, he
11 has at best only shown that he was not provided adequate care and that the
12 catheterization may be medically unacceptable. However, neither showing is sufficient to
13 satisfy the second prong. See *Farmer* v. 511 U.S. at, 835; *Toguchi*, 391 F.3d at 1058.
14 Plaintiff has not offered any evidence to show that the decision to order catheterization
15 was done in "conscious disregard of an excessive risk of" Plaintiff's health. *Toguchi*, 391
16 F.3d at 1058. The Court therefore adopts the Magistrate Judge's recommendation to
17 grant summary judgment as to Count II.

18 **3. Count IV: Deliberate Indifference to Serious Medical Need Re
19 Delay in Dental Care**

20 Where, as here, a prisoner alleges that delay of medical treatment evinces
21 deliberate indifference, the prisoner must show that the delay led to further injury. See
22 *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985)
23 (holding that "mere delay of surgery, without more, is insufficient to state a claim of
24 deliberate medical indifference"). The Magistrate Judge found that the medical records
25 undisputedly show that "Plaintiff was seen by a dentist on a number of occasions, was

26 ²Plaintiff cites to a declaration from his aunt, Janet E. Leonard, who "was an LPN
27 nurse for 43 years," as support for his argument that catheterization was not medically
28 necessary. (ECF No. 90 at 2.) He references other declarations from expert witnesses
 which support the same opinion in his subsequent motion to submit new evidence. (ECF
 No. 103.)

1 provided Fixodent, was prescribed a soft food diet, and eventually received new
2 dentures." (ECF No. 89 at 11.) The Magistrate Judge further found that, while there may
3 have been some delay in Plaintiff obtain new dentures, Plaintiff cannot show "further
4 injury." (ECF No 89 at 11.) Having reviewed the records in this case, the Court agrees.

5 In his objection, Plaintiff argues that he should be given the opportunity to conduct
6 discovery to obtain evidence of "further injury." (ECF No. 90 at 5-6.) However, such
7 evidence should be in Plaintiff's possession; evidence of "further injury" to Plaintiff would
8 not be coming from Defendants. Plaintiff thus cannot show he cannot obtain facts
9 needed to justify his opposition to Defendants' Motion as required under Fed. R. Civ. P.
10 56(d).

11 **V. CONCLUSION**

12 It is therefore ordered, adjudged and decreed that the Report and
13 Recommendation of Magistrate Judge Valerie P. Cooke (ECF No. 89) is accepted and
14 adopted in full.

15 It is further ordered that Defendants' Motion for Summary Judgment (ECF No. 53)
16 is granted.

17 It is further ordered that Defendant's motions to strike (ECF Nos. 97, 98, 111) are
18 granted. Plaintiff's reply brief (ECF No. 95) and filings relating to new evidence (ECF
19 Nos. 91, 94, 107) will be stricken.

20 It is further ordered the following motions filed by Plaintiff are denied: second
21 motion for appointment of counsel (ECF No. 88); second motion for reconsideration
22 (ECF No. 93), motion for continuance (ECF No. 99), and motions for leave to file new
23 evidence (ECF Nos. 103, 114).

24 It is further ordered that the Clerk enter judgment and close this case.

25 DATED THIS 17th day of August 2017.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE